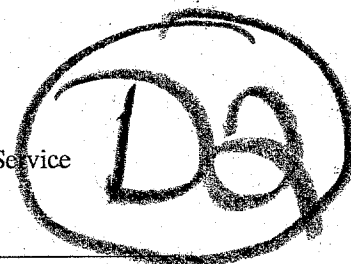




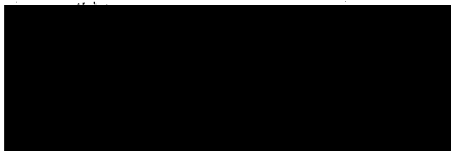
PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Justice
Immigration and Naturalization Service



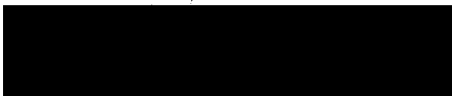
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: LIN-01-022-53431 Office: Nebraska Service Center

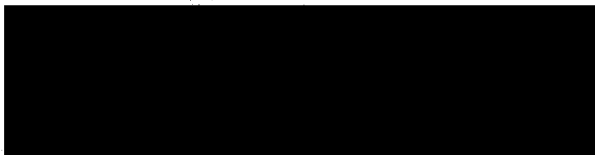
Date: **JAN 17 2003**

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an Indian restaurant with two employees and a stated gross annual income in excess of \$86,000. It seeks to employ the beneficiary as an operations manager for a period of three years. The director determined the petitioner had not submitted a certified labor condition application and had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief and additional documentation.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

The director concluded that the record contains insufficient evidence to demonstrate that the proffered position could only be successfully performed by an individual whose education and training are equivalent to a baccalaureate or higher degree. The director also determined that the petitioner had not submitted a certified labor condition application. On appeal, counsel argues that the duties of the offered position are similar to those of a market research analyst or a business analyst, positions that both clearly qualify as a specialty occupation. Counsel asserts that this argument is supported by the holdings reached in several previous non-precedent decisions by the Associate Commissioner. Counsel contends that the Service has rejected substantial evidence submitted in support of the petition, and thereby ignored the holding reached in Unico American Corp. v. Watson, CV No. 896958 (C.D. Cal. Mar. 19, 1991). Counsel also includes a copy of a certified labor condition application.

The arguments put forth on appeal by counsel are not persuasive. The Service does not rely solely on the title of a position in determining whether that position qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In a letter which accompanied

the initial I-129 petition, the petitioner described the duties of the proffered position as follows:

- * Directs activities of restaurant: Interprets and implements company policies, and develops operating procedures to facilitate restaurant operations;
- * Prepares budget estimates, determine work load, personnel and equipment requirements;
- * Approves restaurant personnel assignments and installation of new equipment;
- * Inspects restaurant installations to ensure that company service and operating standards are followed;
- * Verifies cash balances to determine accuracy and completeness of financial accounts and records.

In response to a Service request for additional information regarding the offered position, counsel contended that the offered job is similar to that of marketing, sales, promotions, and business management positions as described in both the Department of Labor's Occupational Outlook Handbook, (Handbook), and the Dictionary of Occupational Titles, (DOT). Counsel described the duties of the position as follows:

- * Strengthen the marketing capability of the company's services by monitoring customers;
- * Understand all the company's service features, pricing mechanism and packaging process to explain services offered to customers and potential customers;
- * Identify, assess and prioritize account opportunities;
- * Apply marketing and sales process management techniques to identify potential customers, negotiate and obtain new customers;
- * Develop marketing, sales, pricing, strategies, and opportunities;
- * Develop presentations to executives of organizations and formulate business promotion plans in soliciting new customers;

- * Conduct business promotion activities of organizations and formulate business promotion plans in soliciting new customers;
- * Observe and analyze social, economic and political trends that might ultimately have an effect on the import and export business and make recommendations to enhance the company's image based on those trends;
- * Keep abreast of current business issues, buying processes and profitability, sales and marketing statistics analysis and monitoring customer preferences; and
- * Identify implicit and explicit customer needs and develop solutions to resolve concerns.

Counsel also asserted that the proffered position is a specialty occupation because it has been assigned a Specific Vocational Preparation (SVP) code of 8 in the Department of Labor's DOT, (4th Ed., Rev. 1991). However, the Associate Commissioner does not consider the DOT a persuasive source of information regarding whether a particular job requires the attainment of a bachelor's degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation.

The Department of Labor has replaced the DOT with the Occupational Information Network (O*Net). Both the DOT and O*Net provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The Department of Labor's Handbook provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into an occupation and advance within that occupation. For this reason, the Service is not persuaded by a claim that the offered position is a specialty occupation simply because the Department of Labor has assigned it a specific SVP rating in the DOT.

On appeal, counsel now argues that the duties of the proffered position parallel those of both a market research analyst and a business analyst. Counsel cites several decisions issued by the Administrative Appeals Unit (AAU) to support this argument. However, the unpublished AAU decisions cited by counsel have no precedential effect in this proceeding. See 8 C.F.R. 103.3(c). Furthermore the position does not appear to be primarily that of a business analyst or a market research analyst in light of the two descriptions of the offered job that have been cited above, as well

as counsel's own characterization of the position as a marketing, sales, promotions, and business management position.

The first reason why the Service is not persuaded to classify the offered position as a business analyst/market research analyst position concerns the particular duties of the offered position compared with the duties of a typical market research analyst position. The Handbook, 2002-2003 edition, at page 239, specifically notes: "[m]arket, or marketing, research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales." While the duties described above appear to involve some sales analysis, the duties of the proffered position appear to combine the duties of a restaurant and food service manager with those of a marketing manager.

The second reason why the Service is not persuaded to classify the offered position as a market research analyst position relates to the type of industry in which the beneficiary would be employed. Information in the Handbook at page 240, provides insight into the types of industries in which market research analysts are normally found. According to the Department of Labor:

Private industry provided about 9 out of 10 jobs for salaried workers, particularly economic and marketing research firms, managements consulting firms, banks, securities and commodities brokers, and computer and data processing companies.

Although the list of private industry employers is not all inclusive, the Department of Labor's description of a market research analyst's job implies that these types of positions are found within large firms or corporations, such as banks or worldwide pharmaceutical companies.

The record indicates that the petitioner, which is an Indian restaurant, employs two persons and has a stated gross annual income in excess of \$86,000. The restaurant industry, the industry in which the petitioner is engaged, is not within the DOL's list of industries that typically require the services of a full-time individual who performs only market research analyst duties. For these reasons, the Service is not persuaded to label the offered position as a market research analyst position. Therefore, the Service is not persuaded to classify the offered job as within either specialty occupation of a business analyst or a market research analyst.

The proffered position appears to combine the duties of a food service manager with those of a marketing manager. A review of the Handbook, at pages 55-57, finds no requirement of a baccalaureate degree in a specific specialty for employment as a restaurant or

food service manager. Some restaurant and food service managers are promoted from the ranks of restaurant workers. Others hold baccalaureate and associate (two-year) degrees in restaurant management and other fields of study.

A further review of the Handbook at pages 26-29, also finds no requirement of a baccalaureate degree in a specific specialty for employment as a marketing manager. A wide range of educational backgrounds are considered suitable for entry into marketing managerial positions. Some employers prefer degrees in business administration but bachelor's degrees in various liberal arts fields are also acceptable. In addition, certain personal qualities and participation in in-house training programs are often considered as important as a specific formal academic background. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

The petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specific specialty for the offered position.

The record contains seven pages of newspaper job advertisements and descriptions for a number of various marketing manager, sales manager, and business manager positions. However, these positions cannot be considered to be parallel to the proffered position because not one of the advertised positions is within the restaurant or food service industry. Furthermore, the advertised positions list degree requirements in a diverse range of academic areas including marketing, communications, advertising, engineering, electrical engineering, computer science, and finance. Consequently, it cannot be concluded that the petitioner has demonstrated that the degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations.

Finally, the petitioner has not demonstrated that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

Counsel argues that the petitioner has met its burden of proof by submitting substantial evidence to establish that the proffered position is a specialty occupation. Counsel contends that the Service has ignored the holding reached in Unico American Corp. v. Watson, CV No. 896958 (C.D. Cal. Mar. 19, 1991), by rejecting evidence such as the petitioner's written statement that it requires a bachelor's degree for employment in the offered job, the conclusions of an evaluation service regarding the degree

requirement for the position, and the job advertisements contained in the record.

Counsel's argument that the petitioner's written statement is sufficient evidence of the degree requirement in that the petitioner should be allowed to determine the minimum education requirements needed to fill the proffered position in light of its own business and employment needs cannot be considered to have merit. While counsel asserts that the holding reached in Unico American Corp. v. Watson, id., dictated such an outcome in this particular case, the holding in this decision can be distinguished in that the proffered position at issue was for a computer programmer, and not a food service manager/marketing manager as in this case. Although counsel indicates that an evaluation service concluded that the minimum degree required for employment in the offered job was a bachelor's degree in business administration, a review of this document shows that it is solely an evaluation of the beneficiary's qualifications and provides no opinion or information regarding the degree required for employment in the proffered position. As previously discussed, the job advertisements contained in the record are not for managerial positions within the restaurant or food service industry, and therefore, cannot be considered as evidence of an industry standard. Counsel has not demonstrated that the cited decision is relevant to the facts and issues of this proceeding.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation as described in paragraph (h)(4)(iii)(A) of this section...

Counsel submits a certified labor condition application on appeal. Nevertheless, that application was certified on October 26, 2000, a date subsequent to October 17, 2000, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. Since this has not occurred, it is concluded that the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.